Supreme Court, U.S.
FILED
FEB 3 - 2011
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No. 10-628

IN THE

SUPREME COURT OF THE UNITED STATES

Kevin J. O'Connor,
Petitioner,

v.

Colorado College,
Respondent.

On Petition For Writ Of Certiorari To
The Colorado Court Of Appeals

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44.1, petitioner respectfully petitions this Court for rehearing.

I.

Whom does tenure protect? Absent a review from this Court, the answer is: everyone and no one. There is irreconcilable conflict both among the divisions of the Colorado Court of Appeals and earlier holdings of this Court as well. This unaddressed conflict, which affects millions of teachers – both tenured and those seeking tenure – should not stand.

Prior to the decision which is the subject of this petition, controlling caselaw in Colorado unequivocally established that the fundamental protection of tenured faculty is the independent hearing body which determines whether adequate cause for dismissal exists. *Lara v. Córdova*, 42 Colo. App. 483; 600 P.2d 105; 1979 Colo. App. Furthermore, the Colorado court ruled that tenure protection may not be removed wholesale from faculty by administrative fiat. *Saxe v. Board of Trustees of Metropolitan State College of Denver,* 179 P.3d 67, (Colo. App. 2007) In effect, tenure protects everyone.

The protection of the institution of tenure as the cornerstone of academic freedom has been recognized by this Court over the past 50 years *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250

(1957); *Keyishian* v. *Board of Regents of Univ. of State of N. Y.,* 385 U. S. 589, 603 (1967).

The division of the Colorado court which issued the instant opinion directly contradicts all previous ruling and precedent of this Court, holding instead that the guarantee universally held to protect a tenured faculty member from arbitrary dismissal, in fact, "carries no weight." (Pet. Brief, App., 7)

It is well settled that the protection of tenure is not absolute. All faculty procedure manuals set forth precise conditions whereby tenured faculty found guilty of egregious conduct may be removed. Courts have likewise historically recognized the authority of administrations to revoke tenure where financial exigency is present, even if the survival of the institution is not threatened (*AAUP v. Bloomfield* College.136 N.J. Super. 442; 346 A.2d 615; 1975 N.J. Super., *Pace v. Hymas,* 726 P.2d 693; *Scheuer v. Creighton University,*199 Neb. 618; 260 N.W.2d 595; 1977 Neb., *& Krotkoff v. Goucher College,* 585 F.2d 675; 1978 U.S. App.). Rulings of US circuit courts have likewise limited the scope of the protection afforded by tenure. Teachers may not expect outrageous or obscene speech to be protected. *Bonnell v. Lorenzo*, 241 F.3d 800; 2001 U.S. App.

In the absence of both adequate cause for dismissal and any suggestion of financial exigency, this case provides the ideal opportunity to clarify what academic freedom protection – if any –remains for tenured faculty.

O'Connor's record as a Fulbright scholar and Teacher of the Year is unchallenged. Indeed, the Colorado court noted that his record of teaching excellence over 17 years was such that O'Connor did not even need student witnesses to appear at trial, since their testimony would have been cumulative. (Pet. Brief, App., 12)

It is also undisputed that O'Connor was a dissident. His whistleblowing on asbestos and his defense of vulnerable non-tenured colleagues and students incurred the wrath of the administration. The administration had a variety of reasons to fire O'Connor. What they lacked was adequate cause.

The Court will find no clearer example than this of discretionary dismissal of tenured faculty: O'Connor was fired solely for the reason the hearing committee, convened in accordance with established procedure, had already determined was not adequate cause.

This case has profound implications for all of the estimated 280,000[1] tenured faculty in the United States. If tenure does not protect individual faculty from dismissal without cause, then the rulings of this Court are eviscerated. Likewise, the concerns about free inquiry in a democratic society on which those precedent-setting cases were based, may now be safely disregarded in the nationwide rush to eliminate tenure.[2] Tenure will indeed protect no one.

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[1] *Wall Street Journal,* January 10, 2005

[2] *The New York Times*, January 31, 2011 "GOP Governors Take Aim at Teacher Tenure

II.

Colorado is an at-will state. *Continental Airlines, Inc. v. Keenan*, 731 P.2d 708 (Colo.1987). Here, having recruited O'Connor from a public university in another state with the promise of tenure, the college revoked his tenure arguing at will employment caselaw. *Dorman v Petrol Aspen, Inc.*, 914 P.2d 909 (Colo. 1996) and *City of Colo. Springs v. Mountain View Elec. Ass'n*, 925 P.2d 1378 (Colo. App. 1995) citing, *Cheyenne Mountain School Dist. No. 12 v. Thompson*, 861 P.2d 711 (Colo. 1993).

The Colorado opinion should be reviewed to determine whether states have the authority to ignore earlier rulings of this Court on academic freedom and permit the termination of tenured faculty solely pursuant to at-will provisions in their respective statutes.

Absent a review of this case, the door is left open for states to substitute at-will provisions for tenure protections. The patchwork employment conditions from state to state will create uncertainty, if not chaos, in the academic profession in the United States.

If the principle of academic freedom – which this Court has held governs tenure – "carries no weight," then this Court should explain why. If there is a reason why this Court's review is not appropriate to support academic freedom, then this Court should at least explain why it would be inappropriate to rely on earlier rulings protecting

academic freedom.

It is, moreover, in the public interest that this Court hear the kind of argument from professional organizations and civil liberties groups which a review of this case would provide.

Phi Beta Kappa and others have published warnings of the dangers to the quality of higher education in the U.S. which the elimination of tenure would present.

> College teachers need to be protected from capricious dismissal. If students are to be taught to think rigorously and creatively — which is their best route to success — they need teachers who can be rigorous, creative and courageous as well. Tenure doesn't guarantee that college teachers are courageous. But it protects those who are.[3]

This case illustrates the adverse impact on students which elimination of the protection of tenure would have. Following O'Connor's removal, the college was emboldened to target student freedoms, subjecting individual students to public humiliation and sanction. The crackdown on politically incorrect speech so appalled observers of

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[3] "Why College Students Need Tenure"
Phi Beta Kappa, *The Key*
http://www.pbk.org/home/FocusNews.aspx?id=641

the academic world that the college earned a place in the hall of shame of one advocacy group (theFIRE).[4]

III.

As O'Connor argued at trial, and as events since the trial have borne out, dismissal of a tenured faculty member "with cause" carries a stigma which prevents a faculty member from ever again obtaining similar employment. This is the academic death penalty.

Faculty hired on a non-tenure track may find other similar employment after being discharged. This Court held that there is no stigma in such dismissal cases. *Board of Regents v. Roth, 408 U.S. 564; 92 S. Ct. 2701; 33 L. Ed. 2d 548; 1972.* Likewise, it is common for faculty who have been denied tenure at one institution to find tenured employment and a successful career at another. Cognizant of this reality of the academic profession, courts have ruled that there is no stigma attached to tenure denial and that those seeking tenure do not have a right to tenured status. *University of Baltimore v. Peri Iz*, 123 Md. App. 135; 716 A.2d 1107; 1998 Md. App.

Here, because of the stigma attached to dismissal with cause of a tenured member of the faculty, O'Connor was deprived of the possibility of ever again securing a similar tenured position. Had there been cause for his dismissal, the loss of his

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[4] Star Chamber at CC, *Rocky Mountain News*, April 16, 2008

career would have been the penalty for egregious conduct.

However, since there was not, the instant decision of the Colorado court offers an expedient solution for academic administrators everywhere: It does not matter what the committee, convened in accordance with established institutional procedure may find; their ruling "carries no weight."

IV.

Evidence of the fraudulent intent of administrators to fire O'Connor – despite the protection of tenure and the findings of the hearing committee – was suppressed by the trial court when the college invoked attorney/client privilege.

The Colorado opinion upholding the trial court's decision to keep those documents from the jury is at odds with both controlling Colorado decisions (*Caldwell v. District Court in and for the City and County of Denver,* 644 P.2d 26, 31 ALR 4th 446), and rulings of this Court. In *Clark v. United States, 289 U.S. 1, 53 S. Ct. 465,* Justice Cardozo wrote:

> "There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."

V.

A review by this Court would resolve for all tenured faculty and their students whether they may continue to expect any protection under the law.

It would, more importantly, remove the element of fraud from the process where academic administrators across the profession advertise "tenure-track" positions to attract the best and the brightest young scholars, while building a legal war chest to defend their termination at will.[5]

A review of the instant decision would likewise provide the 1.7 million post-secondary teachers in the United States[6] what they have a right to know: whether tenure still exists.

James Madison's warning resounds for our time: "There are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and

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[5] The college with assets of almost $500 million, belongs to a nationwide syndicate, United Educators of America, which established a legal war chest to defend against wrongful termination suits brought by faculty. Upon information and belief, fees in excess of $2 million were paid by United Educators to three different law firms on behalf of the college (whose sole obligation was the $50,000 deductible).

[6] Bureau of Labor Statistics
http://www.bls.gov/oco/ocos066.htm

sudden usurpations." *(Speech to the Virginia Ratifying Convention, June 16, 1788)*

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted, the order of January 10, 2011 vacated and certiorari granted.

Respectfully submitted,

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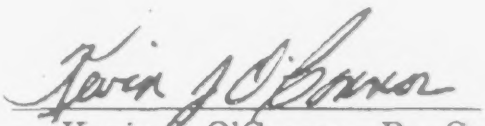
CERTIFICATE OF GOOD FAITH

I hereby certify that this petition for rehearing is presented in good faith and not for purposes of delay.



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